

Dear State Environmental Commissioner:

The purpose of this letter is to solicit your input as EPA launches an effort to review existing Memoranda of Agreement (MOAs) between the Environmental Protection Agency (EPA) and states governing the National Pollutant Discharge Elimination System (NPDES) permit program.

As you know, this effort is part of the Agency's activities under the October 15, 2009, Clean Water Act Action Plan (CWA Action Plan), and the Interim Guidance to Strengthen Performance in the NPDES Program (June 22, 2010). As stated in the transmittal memo for the June 22, 2010 Interim Guidance, we are initiating "actions outlined in the Clean Water Act (CWA) Action Plan aimed to focus our NPDES planning and resources on the most significant sources of water quality impairment and ensure consistent enforcement across states that maintains a fair and level playing field for the regulated community and all Americans." This specific effort was discussed with representative states on the CWA Action Plan Steering Committee call on January 25, 2012.

One of the major tenets of the CWA Action Plan is strengthening oversight of state NPDES programs and, more generally, improving the performance of both EPA and state NPDES permitting and enforcement efforts.¹ Part of the effort to improve the operation of state NPDES programs is to assess the status of the state programs, including the MOAs. The NPDES MOAs are the principal agreements between the EPA and authorized states in our interaction on both EPA's and the state's behalf for the NPDES program. Some MOAs date from initial authorization in the mid-1970s and may not be consistent with current requirements, may lack important components that have been added to the program, or, for some reason, have provisions that may restrict EPA or state actions. In order to ensure that the MOAs do not impede effective NPDES programs, EPA believes it is timely to initiate these reviews.

To facilitate our effort, the EPA is providing you two draft guidance documents for your review and comment. First is a draft set of review criteria and checklist for NPDES MOAs. The criteria include five overall criteria as well as a detailed checklist focusing on the elements of the MOA that we believe are key for ensuring effective interaction between the EPA region and state in implementation of the NPDES program to protect public health and the environment. The draft criteria and checklist are intended to be used as a tool by the region and state in reviewing the

¹ The effort to undertake a review of existing MOAs is also a component of the Agency's response to recommendations by the EPA Office of Inspector General (OIG) in September 2010 to review NPDES MOAs and update as necessary.

existing MOA and in making revisions if necessary. Second, we are providing a draft model MOA, which is based, in part, on the final or draft revisions to MOAs between 12 states and four EPA regions completed over the last ten years. EPA last issued a Model MOA as part of its 1986 State Program Guidance.

It is important to emphasize that the EPA does not believe that every MOA needs revision, nor does the EPA intend for every MOA to mirror the model. EPA's goal is to collaborate with individual states to identify and correct those MOAs that prohibit or hinder the effective implementation of the state's NPDES program. In our discussion with an individual state, it may be possible to find solutions to address any problems through use of other written binding agreement such as state/EPA agreements, grant workplans, and or a supplemental Attorney General's statement.

The EPA expects that NPDES program MOAs will be reviewed by each state and EPA regional office at least once every four years in accordance with the four year cycle for integrated oversight activities developed under the CWA Action Plan. In developing the draft review criteria and checklist and the Model MOA, it is our intent that these serve as useful tools for both the states and regional offices in their reviews of existing MOAs. The cycle provides that each state and EPA region will undergo an integrated NPDES Permit Quality Review and State Review Framework enforcement oversight review at least once every four years. The NPDES MOA review for each state may be conducted concurrently or before the integrated review process. Problematic MOAs identified in this process should be revised expeditiously, and all necessary changes should be made by September 2017.

Based on the review, any MOA that may hinder or prevent the effective implementation of the program should be revised as necessary. For each of these MOAs, the EPA anticipates engaging the state in a process to revise the MOA as necessary and will be conducted using the procedures in the NPDES regulations for program modification. We expect that the draft model MOA will prove useful by providing possible language for any necessary MOA modifications, as well as serve as a template for new MOAs.

As noted above, the EPA will work with the states to review existing MOAs in order to identify MOAs that pose legal or practical barriers to program implementation for EPA and the state, based on the criteria. If an MOA is found to be deficient based on the above criteria, the EPA and the state should revise the MOA as necessary. Note, however, that the criteria, checklist and MOA are intended solely as a guide to the minimum critical elements that should be included in an MOA, as well as for use by states and Tribes seeking NPDES program authorization in the future, but it does not need to be matched word for word.

With that in mind, we are seeking comments from you on the review criteria and checklist and the model MOA. Do these documents contain the proper provisions and questions, and do they reflect the relevant NPDES program requirements for state programs? These two documents are subject to revision and we welcome your input. We are requesting that you provide comments by May 14, 2012.

As a follow up to this letter, the EPA will hold a conference call on May 3, 2012, at 3:00 – 5:00 pm EDT, (1 866-299-3188, code 202 564 0626#), to provide an overview of the review criteria, checklist and of the various sections of the model MOA, and to respond to the states' preliminary questions and comments. Please send any written questions and comments on the criteria, checklist and model MOA by May 14, 2012, to Gary Hudiburgh at hudiburgh.gary@epa.gov (202-564-0626), and Chad Carbone at carbone.chad@epa.gov (202-564-2523). Thank you for your assistance.

Sincerely,

Lisa Lund, Director
Office of Compliance
Office of Enforcement and Compliance Assurance

James A. Hanlon, Director
Office of Wastewater Management
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Enclosures

cc: Michael Shapiro, DAA-OW
Steven Chester, DAA-OECA
Regional Administrators
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